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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ROBERT RICHARDSON
PETITIONER

VS.

ALBERTSON'S, INC.
A DELAWARE CORPORATION
RESPONDENT

ON PETITION FOR A WRITE OF CERTIORARI TO

TENTH CIRCUIT COURT

PETITION FOR WRIT OF CERTIORARI

ROBERT RICHARDSON
3545 BIRNAMWOOD DRIVE
COLORADO SPRINGS, CO 80920
(719)282-0568

QUESTION(S) PRESENTED

1. How can the Court of Appeals affirm a Summary Judgment on a statutory right and drop a violation of Title VII and ADA?

2. How can the Court of Appeals affirm a Summary Judgment that, when the genuine issue is the charge that was an action brought against Defendant?

3. How can a company have different rules for its white employees and different rules for its Black employees?

4. How can the Defendant have a three-day rule before a person needs a doctor's note in order to return to work but fires the Plaintiff for taking off one day?

5. How can the Defendant write up the Plaintiff simply for asking for a promotion?

6. How can the Defendant give the Plaintiff a letter of suspension for taking off one sick day when Plaintiff has 248 hours of accumulated sick leave?

7. How can the Court of Appeals affirm a Summary Judgment when the disputed facts are outcome determination under the governing law?

8. How can the Court of Appeals affirm a Summary Judgment when there are no pleadings, depositions, answers to interrogatories, and admissions on file from either Plaintiff or Defendant's witnesses?

9. How can the Court of Appeals and District Court affirm that EEOC can drop an ADA charge?

10. How can the Court of Appeals affirm this order and judgment cited under the terms and conditions of the Tenth Circuit Rule 36.3., when the District Court made a decision under Rule 56[S]?

11. How can the Court of Appeals affirm a Summary Judgment when it did not look at the court records or at the Appellant's brief or evidence?

12. How can the Court of Appeals affirm appellee did not shift the burden of evidence under Rule 301(8)(9)(10)(11)(12)?

13. How can a person use his sick leave that has been earned? How can a person use his accumulated sick hours under a Union contract, and what is a bona fide illness or sick leave?

14. How can the Courts affirm a Summary Judgment on a genuine issue, when it is not between the Plaintiff and the Defendant but others?

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13. McDonnell Douglas Corp. vs. Green cited as 411 US 792, 362Ed 2d668, 93 S Ct 1817	668-680
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STATUTES AND RULES

Rule 56[S]
Rule 301
Rule 37, 73, 72
Rule 26, 36, 33
Bakery Agreement between Albertson's Inc. and Bakery, Confectionery & Tobacco Worker's International Union Local #26, Denver, Colorado, Article 12 and 21

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PETITION FOR WRITE OF CERTIORARI

OPINIONS BELOW

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is unpublished.

The date on which the United States Court of Appeals decided my case was July 29, 1996. A timely petition for rehearing was denied by the United States Court of Appeals on September 16, 1996, and a copy of the order denying rehearing appears at Appendix C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. S 706(f) of Title VII of the Civil Rights Act of 1964, 42 U.S.C S2000E-5(f) 28 U.S.C.

2. 5706 (f) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000 E-5(f) 28 U.S.C. S 1991(c).

3. Rule 56[S]

4. Rule 301

5. Rule 26, 33, 36, 37, 73, and 72

STATEMENT OF THE CASE

Plaintiff is a Black male citizen of the State of Colorado and resides in El Paso County. Defendant hired him on or about November 21, 1984 into a full-time position as a baker. During the course of his employment, Plaintiff was continually being "written up" by his white supervisor for conduct that did not attract such measures when engaged in by white co-workers, who were not written up or suspended.

Plaintiff suffers from asthma and from time to time Plaintiff has experienced an asthma attack at work, at least in part because of the flour dust in the air, which in general caused a shortness of breath. On or about June 2, 1992, Plaintiff left his work place during his lunch hour and did not return because of an asthma attack. He called in to inform the bakery manager that he would not be returning that day. The next day, Plaintiff's wife called in to inform Defendant that Plaintiff was still too ill to return to work. When Plaintiff attempted to return on or about June 5, 1992, Defendant prevented him from doing so because he failed to produce a physician's statement verifying his illness. At this time, Plaintiff had accrued 248 hours of sick leave. Company policies allowed a person a three-day grace period before he/she needed a physician's statement. Under the same policies, Defendant refused to honor the Union Bargaining Contract and refused to arbitrate the grievance filed by Plaintiff with the Union after his termination. However, Defendant has made it a practice to arbitrate all grievances presented by white employees.

The Plaintiff was terminated when he took off a sick day. however, when a white employee took off a sick day, the white employee was not terminated. Defendant appears to have a policy in which a white employee needs a physician's statement after three sick days while the Black employee needs a physician's statement after only one sick day. Plaintiff was placed on suspension and then terminated. When a white co-worker was in a similar situation, he/she was not disciplined as harshly as the Black Plaintiff.

Plaintiff's complaint states two claims — race and color discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. s 200e. et sez. and 42 U.S.C. s 1981, and disability discrimination, in violation of Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12111-12117.

REASONS FOR GRANTING THE PETITION

This petition must be granted because the lower court did not prove whether or not the Defendant met all the requirements under Federal Rules of Civil Process (Rule 56[S]) to be granted a Summary Judgment. When the Court of Appeals Tenth Circuit affirmed the lower court order and judgment, it came in conflict with (1) (Rule 56[S] and Celotex Corp. vs Catrett 477 US 317, 912 Ed 2d 265, 106 S Ct 2548) Defendant did not do a full discovery. The lower court did not have all the pleadings, depositions, answers to interrogatories, witness' testimony, and admissions from either the Defendant or the Plaintiff. (2) (St. Mary's Honor Center et al. vs Melium Hicks) The court did not look at the letter of suspension dated June 25, 1992 or the letter from EEOC dated October 22, 1993. The Court of Appeals did not use the Rule of Evidence in this case. The lower court also did not use the Rule of Evidence in the case of St. Mary Honor Center vs Hicks. (3) The Court of Appeals affirmed this case came in conflict with Pryner vs Tractor Supply Co. [cited as 927 F Supp. 1140 (S.D. Ind 1996)]. Concerning statutory rights and other constitutional rights, Plaintiff did not give up his constitutional right when he filed a complaint with the EEOC.

CONCLUSION

Defendant's Motion for a Summary Judgment must be reversed by this court. The Court of Appeals and the lower court have not looked at the governing law concerning a Summary Judgment or the Rule of Evidence in a discrimination case. The Plaintiff only took off one

sick day while having accumulated 248 hours sick leave, whereas a white co-worker who took off one sick day was not discharged.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert L. Richardson

Robert L. Richardson

Date: 20 Jan 1997

APPENDIX A

UNITED STATES COURT OF APPEALS
Filed 7/29/96
TENTH CIRCUIT

ROBERT RICHARDSON, Plaintiff-Appellant, v. ALBERTSON'S, INC., a Delaware Corporation, Defendant-Appellee.	No. 96-1036 (D.C. No. 94-B-1774) (D. Colorado)

ORDER AND JUDGMENT[1]

Before **BRORBY, EBEL** and **HENRY, Circuit Judges.**

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9.

---

[1] This order and judgment is not binding precedent except under the doctrines of law of the case, *res judicata* and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, the order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

The case is therefore ordered submitted without oral argument.

Appearing pro se, Robert Richardson appeals the district court's order granting Albertson's motion for summary judgment on his claims that Albertson's termination of his employment violated the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and 42 U.S.C. § 1981. We affirm.

Albertson's terminated Mr. Richardson from his position as a baker on August 7, 1993. Mr. Richardson, an African American, claims he was fired for being absent from work for two days without having a doctor's note for verification while white employees were not required to produce doctor's notes for similar absences. Albertson's claims they fired Mr. Richardson "for failing to report to work as scheduled, failing to comply with a reasonable request that he provide documentation concerning his absence, and because of Albertson's belief that he lied about the events of June 2-5, 1992, asked a co-worker to lie for him, and falsely denied reporting to work."

Prior to filing his complaint in district court, Mr. Richardson was required to exhaust his administrative remedies regarding his claims under the Americans with Disabilities Act and Title VII. 42 U.S.C. §2000e-5; 42 U.S.C. § 12117(a); *Khader v. Aspin*, 1 F.3d 968, 970 (10th Cir. 1993). He attempted to do this by filing a claim with the Equal Employment Opportunity Commission (the "Commission"). In its determination letter, the Commission found "Charging party has failed to provide, medical documentation to show that he is a qualified individual as required by the ADA. Therefore, the Commission finds that it has no jurisdiction on the allegations filed under the Americans with Disabilities

Act." We have held that "when a complainant refuses or fails to provide the agency information sufficient to evaluate the merits of the claim, he or she cannot be deemed to have exhausted administrative remedies." *Khader*, 1 F.3d at 971 (internal quotation marks omitted). We therefore agree with the district court's finding that it lacked jurisdiction over Mr. Richardson's claim under the Americans with Disabilities Act because by failing to provide the Commission with the documents it needed to determine his claim, he failed to adequately exhaust his administrative remedies.

The Commission's letter did dismiss Mr. Richardson's Title VII claims on the merits. We agree with the district court that he failed to show any evidence of racial discrimination and his Title VII claim and his § 1981 claim were properly dismissed on summary judgment. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 186-87 (1989) (same analysis applies to Title VII and § 1981 claims). Under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), an employee carries the initial burden of establishing a prima facie case of racial discrimination. If this is done, the burden then shifts to the employer to show a legitimate, non-discriminatory reason for terminating the plaintiff. *Id.* If the employer does so, the burden then shifts back to the plaintiff to establish the employer's reasons as pretext. *Id.* at 804; *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995). The district court found:

> Assuming that Richardson can set forth a prima facie case of racial discrimination, Albertson's has met its burden of setting forth a legitimate non-discriminatory reason for terminating him. Albertson's proffers affidavits of four employees who confirm the events of June 2 through 5. These facts are uncontroverted based on Richardson's failure to provide evidence other

> than his own conclusory allegations regarding these events. Therefore, Richardson presents no evidence that the proffered reasons for his termination were pretextual. Accordingly he fails to set forth a prima facie case of racial discrimination and Albertson's is entitled to summary judgment on Richardson's Title VII and § 1981 claims.

After liberally construing the record, the only evidence we can find that Mr. Richardson offers of race discrimination are his unsupported allegations white coworkers were not fired for failing to report to work and his statement that he has shown "his witness and produce[d] evidence to show a genuine issue in his pretrial disclosures." He fails to identify who this witness is or what their testimony would be; nor does he identify any non-minority coworkers who were treated differently than he was. He also fails to provide any evidence to dispute the legitimate reasons Albertson's gave for terminating him. Mere conclusory allegations unsupported by any evidence are not enough to withstand a motion for summary judgment.

The order of the district court is **AFFIRMED**.

Entered for the Court:

WADE BRORBY
United States Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Judge

Civil Action 94-B-1774

ROBERT RICHARDSON,

Plaintiff,

v.

ALBERTSON'S, INC., a Delaware corporation,

Defendant.

ORDER

Defendant Albertson's Inc. (Albertson's) moves for summary judgment on plaintiff Robert Richardson's (Richardson) complaint. Richardson alleges that Albertson's termination of his employment violated the Americans with Disabilities Act, 42 U.S.C. § 12101 et. seq., Title VII of the Civil Rights act of 1964, as amended (Title VII), 42 U.S.C. § 2000e et. seq., and 42 U.S.C. § 1981. The motion is fully briefed and oral argument will not materially aid its resolution. For the reasons set forth in this order, I grant the motion for summary judgment on all claims.

I.

The following facts are not genuinely disputed based on Richardson's failure to provide evidence other than his own conclusory allegations in support of his version of the events of June 2 through 5. Richardson is an African-American male who was employed by Albertson's as a baker in Colorado Springs, Colorado. On June 2, 1992, Richardson left the store for his lunch break. During the break, he telephoned his Bakery Manager, Jacqueline Johnson, and told her he would be late returning to work because he had a flat tire. Hildebrand Aff. ¶ 4; Johnson Aff. ¶¶ 3-5. During Richardson's absence, two police officers from the El Paso County Sheriff's Office came to the store with a warrant for Richardson's arrest. The store director, Pat Hildebrand, told the officers that Richardson was at lunch but would be returning. Hildebrand Aff. ¶¶ 5-6. The officers and William Winters, a co-worker of Richardson's, were at the store's entrance when Richardson drove into the parking lot. When he saw the officers, Richardson drove off and did not return to work that day. Winters Aff. ¶ 3.

On June 3, 1992, Richardson called in sick. He did not state what the nature of his illness was. On June 4, 1992, Richardson arrived for work at approximately 2:00 a.m. Before punching in he saw Winters who questioned him regarding the events of June 2, 1994. Richardson admitted to Winters that he left the store because the police officers wanted him for failure to appear. Winters Aff., ¶ 4. Richardson then left the store. He asked Winters to lie if anyone asked him whether he had seen Richardson. Russell Weiant, Karl Quintana, and Weston Pauling all verified that Richardson was at work the morning of June 4. Hildebrand Aff. ¶ 11.

On June 5, 1992, Richardson called Hildebrand stating that he was ill on June 3 and 4 and had gone to the doctor

on June 4. Hildebrand requested Richardson to bring in verification of his office visit. Richardson failed to produce this documentation. When questioned, Richardson denied that he had been at work on June 4. Hildebrand then suspended Richardson pending investigation. Hildebrand Aff. ¶ 13.

On June 25, 1992, Michael Schwarzkopf, Albertson's regional director, sent Richardson a letter setting forth the events of June 2-5. Schwarzkopf requested that Richardson respond with any and all documentation that he had disproving the facts as known to Albertson's. Schwarzkopf also requested that Richardson provide a written statement documenting the events of June 2-5. A decision regarding Richardson's employment would be made by July 15, 1992. Schwarzkopf Aff. ¶ 4.

On July 15, 1992, Richardson responded to the letter with a one-page, hand-written note and a copy of page 9 of the labor contract between Albertson's and the Union. The letter and documentation was not responsive to Schwarzkopf's requests. Because Albertson's had no evidence supporting Richardson's version of the events of June 2-5, Richardson was terminated effective July 15, 1992. Schwarzkopf Aff. ¶¶ 5-7.

Richardson subsequently filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging racial discrimination and disability discrimination. Richardson received two letters from the EEOC requesting information verifying his disability including all documentation from his physician and a description of any accommodation requested. Defendant's Brief, Exh. M. Richardson failed to provide the EEOC with any documentation. Plaintiff's Brief, Exh. G. A determination letter was executed April 21, 1994. The letter stated that due to Richardson's failure to provide documentation showing that he is a qualified individual as required by the ADA, the EEOC lacked jurisdiction over

this claim. The letter further stated that after reviewing Richardson's claim it was determined that "the evidence obtained during the investigation does not establish a violation of the statutes." Plaintiff's Brief, Exh. G. p.2. Richardson was informed that "THE CHARGING PARTY MAY ONLY PURSUE THE TITLE VII CLAIM BY FILING SUIT AGAINST THE RESPONDENT NAMED IN THE CHARGE IN FEDERAL DISTRICT COURT WITHIN 90 DAYS OF RECEIPT OF THIS LETTER. Otherwise, the Charging Party's right to sue will be lost." Id. On July 29, 1994, Richardson filed this action alleging that Albertson's violated Title VII, the ADA, and § 1981.

II.

Fed.R.Civ.P.56 provides the summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions, or affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P.56(c). The non-moving party has the burden of showing that there are issues of material fact to be determined. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A party seeking summary judgment bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, interrogatories, and admissions on file together with affidavits, if any, which it believes demonstrate the absence of genuine issues for trial. *Celotex*, 477 U.S. at 323; *Mares v. Conagra Poultry Co., Inc.*, 971 F.2d 492, 494 (10th Cir. 1992).

Once a properly supported summary judgment motion is made, the opposing party may not rest on the allegations contained in his complaint, but must respond with specific facts showing the existence of a genuine factual issue to be

tried. *Ottenson v. U.S.*, 622 F.2d 516, 519 (10th Cir. 1980); Fed. R. Civ. P. 56(e). These specific facts may be shown "by any of the kinds of evidentiary materials listed in Rule 56(c), except the pleadings themselves." *Celotex*, 477 U.S. at 324. If a movant establishes entitlement to judgment as a matter of law given uncontroverted, operative facts contained in the documentary evidence, summary judgment will lie. *Mares*, 971 F.2d at 494.

III.

Before bringing a claim in federal court under Title I of the ADA or Title VII, the charging party must exhaust his administrative remedies. 42 U.S.C. § 2000e-5; 42 U.S.C. § 12117(a); *Wade v. Secretary of Army*, 796 F.2d 1369, 1377 (11th Cir. 1986); *Olds v. Alamo Group (KS), Inc.*, 889 F. Supp. 447, 449 (D. Kan. 1995) (Title I of the ADA incorporates the remedies and procedures of Title VII). If an employee refuses or fails to provide sufficient information so that the agency can evaluate the merits of the claim, he "cannot be deemed to have exhausted administrative remedies." *Wade*, 796 ^F.2d at 1376.

As part of the EEOC investigation, the EEOC requested Richardson provide to it all documentation related to his disability. The determination letter of April 21, 1994, states that Richardson failed to provide any documentation upon which the EEOC could determine whether he was a qualified individual under the ADA. As a result, the EEOC lacked jurisdiction over Richardson's ADA claim based on his failure to cooperate. Thus, Richardson failed to exhaust his administrative remedies with regard to his ADA claim which deprives this court of jurisdiction. *Bridges v. Diesel Serv., Inc.*, 3 A.D. Cases 914, 915 (E.D. Pa. 1994). Moreover, this court lacks jurisdiction over the alleged ADA claim because the events giving rise to the claim occurred before July 26, 1992, the

effective date of the ADA. *O'Bryant v. City of Midland*, 9 F.3d 421 (5th Cir. 1993); *Smith v. United Parcel Service of America Inc.*, 65 F.3d 266, 268 (2d Cir. 1995). Consequently, I grant the motion for summary judgment on Richardson's ADA claim.

Albertson's also argues that Richardson's Title VII and ADA claims must be dismissed because he failed to file his action within 90 days of receipt of the Notice of Right to Sue. I agree. The determination letter was mailed on April 21, 1992. Pursuant to Fed.R.Civ.P.6(e), three days is added onto the prescribed period for mailing. *Baldwin Co. v. Welcome Center*, 466 U.S. 147, 148 (1984). Richardson filed his complaint on July 29, 1994 outside of the allotted ninety-three day period. Therefore, Richardson's Title VII and ADA claims must be dismissed for failure to comply with the procedural requirements.

Moreover, Albertson's argues that even if Richardson's claims were timely filed, he cannot establish a prima facie case of racial discrimination under Title VII or § 1981. To prevail on a claim of racial discrimination under Title VII, a plaintiff must prove, either directly or indirectly, that his race was a motivating factor for the employment action of which he complains. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The Supreme Court in *McDonnell Douglas* established the burdens of proof in a Title VII action. First plaintiff must establish by a preponderance of the evidence a prima facie case of racial discrimination. The burden then shifts to the defendant to prove legitimate non-discriminatory reasons for denying the individual employment. If the defendant meets its burden, the plaintiff must be given an opportunity to establish that the defendant's purported reasons for denying employment are a mere pretext. *Id.* The same analysis is applicable to a § 1981 claim. *Patterson v. McLean Credit Union*, 491 U.S. 164, 186-87 (1989).

To set forth a prima facie case of racial discrimination Richardson must prove that: (1) he belongs to a class protected under Title VII; (2) he was qualified for the position of baker; (3) he was terminated; and (4) the position was filled by a white individual. *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993). Assuming that Richardson can set forth a prima facie case of racial discrimination, Albertson's has met its burden of setting forth a legitimate non-discriminatory reason for terminating him. Albertson's proffers affidavits of four employees who confirm the events of June 2 through 5. These facts are uncontroverted based on Richardson's failure to provide evidence other than his own conclusory allegations regarding these events. Therefore, Richardson presents no evidence that the proffered reasons for his termination were pretextual. Accordingly, he fails to set forth a prima facie case of racial discrimination and Albertson's is entitled to summary judgment on Richardson's Title VII and § 1981 claims.

Accordingly it is ORDERED that:

The defendant's motion for summary judgment on all claims is GRANTED, judgment to enter for defendant Albertson's against plaintiff Richardson on all claims with costs awarded to defendant.

Dated: January 12, 1996 in Denver, Colorado.

BY THE COURT:

S/

LEWIS T. BABCOCK, JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROBERT RICHARDSON,

Plaintiff - Appellant,

v. No. 96-1036

ALBERTSON'S, INC.
a Delaware corporation,

Defendant - Appellee.

ORDER
Entered September 16, 1996

Before BRORBY, EBEL, and HENRY, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the Court
PATRICK FISHER, Clerk

By S\
Deputy Clerk

APPENDIX D

ALBERTSON'S

June 25, 1992

Mr. Robert L. Richardson
2380 Vintage Drive
Colorado Springs, CO 80920

Dear Mr. Richardson:

It has come to my attention that you are on indefinite suspension from your job at Store #858 in Colorado Springs due to events that transpired earlier this month. Specifically, I understand that on June 2 you never came back to finish the remainder of your shift after you went to lunch that day. Many eye witnesses observed that as you were driving through the parking lot to park so that you could return and finish your shift, you observed the Store Director and others, including the police, waiting for your return. The police had a warrant for your arrest. When you saw them, you sped up and drove off, never to call or return that day. When you were interviewed by the Store Director the next day, you told him that you had felt sick and had gone home.

The next day, June 3, you called in sick.

On June 5, while being interviewed by the Store Director again, you claimed that you had missed your June 4 shift as well because you had gone to a doctor over what you

claimed was your asthma problem. You indicated that three years ago you had gone to a doctor for the very same problem and that you might have to wear a dust mask or find another job because of the effect the flour was having on you. When the Store Director asked you, you had no bill or prescription or any other kind of verification of either the medical problem or that you had actually been to a doctor due to your claimed illnesses on June 2, 3 and 4. The Store Director specifically asked you on two occasions during that interview whether you had been in to work on June 4 at any time. To both occasions, you answered that you had not been.

We have learned, however, that at about 2:00 a.m. on June 4 (the start of your shift) you appeared at the store ready to work. We have learned that a number of employees saw you and that at least one of them spoke to you about your problems with the police. When that individual persisted in questioning you about the issue, you told him that you had something else you needed to do and that you weren't going to work. (You specifically told him not to tell anyone that you had been in and to lie for you.) You then left the store.

As you know, Albertson's has had a great deal of difficulty with your work performance for a number of years. We feel as if our company and the various supervisors you have worked for have done everything in their power to make you an acceptable employee. I personally know of no other individual who has ever worked for our company who has been given anything close to the number of opportunities you have been given. Because of this history of failings, and because we suspect that you have most recently falsified the reasons for your absenteeisms (and have in fact asked a fellow employee to lie for you to cover them up), we are about to make a

decision about whether you will be employed with Albertson's in the future.

Therefore, and in fairness to you, we respectfully request that you provide any and all documentation you may have or may be able to obtain that would tend to indicate that the things I have set forth above are not true. This would include your providing a written statement seeking to clear up what appears to us has happened. We intend to make a decision about these matters no later than July 15, 1992, unless you tell us that there is some document or thing you have not been able to obtain or complete by that time (and you give us a time when we may reasonably expect the additional information).

If you have a question about any of this, please feel free to give me a call. My number is area 208-385-6477.

Thank you for your attention to this.

Sincerely,

S\
Michael B. Schwarzkopf
Regional Director, Labor Relations
Labor Relations Department

MBS:mma

cc: Joe Maestas - BC&TW Local #26
Karen Freckleton - Albertson's Labor Relations
Pat Hildebrand - Albertson's Store #858
Bob Schiefelbein - Albertson's #3800 Division

APPENDIX D

ALBERTSON'S

July 14, 1992

Mr. Robert L. Richardson
3066 Meander
Colorado Springs, CO 80906

Dear Mr. Richardson:

On June 25, 1992, we sent a Certified letter to you at 2380 Vintage Drive in Colorado Springs. (This address appeared on National Labor Relations Board correspondence.) As of this date, we have not been notified by the Post Office that you have picked up this letter. We therefore are attempting to reach you by other means.

I have enclosed a copy of the June 25, 1992 letter to you in which we requested you provide any and all documentation you may have or may be able to obtain that would tend to indicate that the things we set forth in that letter were not true. We are requesting you provide a written statement seeking to clear up what appears to us has happened. We intend to make a decision about these matters no later than August 7, 1992 unless you tell us that there is some document or thing you have not been able to obtain or complete by that time (and you give us

a time when we may reasonably expect the additional information).

If you have a question about any of this, please feel free to give me a call. My number is 208-335-6384.

Thank you for your attention to this.

Sincerely,

S\
Karen S. Freckleton
Contract Administrator
Labor Relations Department

KSF:mma

cc: Joe Maestas, BC&TW Local #26

Enc.

APPENDIX E

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Denver District Office

October 22, 1993

Robert L. Richardson
2820 Woodland Hill Drive
Colorado Springs, CO 80920

Re: Richardson vs. Albertson's
Charge No. 320931528

Dear Mr. Richardson:

Reference your office visit on October 7, 1993, you brought in some documentation dated November 23, 1986, regarding your problems with shortness of breath. I am unable to ascertain that from the documentation that you have provided to me that you a qualified individual under the Americans with Disabilities Act.

I would like to have further evidence from your physician or medical treatment that can identify a history of your claimed disability.

Please forward the following information by November 13, 1993.

1. Provide copies of any medical bills, insurance claims, Doctor visits dates and treatment you have received regarding your disability.

2. Specifically, on June 3, and June 4, 1992, (The dates of which your employer terminated you) you stated that you had been sick and had to go to the Doctor. PLEASE PROVIDE ANY BILLS, HOSPITAL TREATMENT STATEMENTS, INSURANCE CLAIMS REGARDING THESE DATES!!!!

3. Was there an arrest warrant out for your arrest on those dates?

4. Please provide any information regarding your employer's failure/refusal to accommodate your disability. Did you ask for accommodation? If so, when (date) and to whom did you submit your request.

If we do not hear from you regarding the above request information within 33 days, by November 24, 1993, we will dismiss your charge.

Please call me at (303)866-1353, Monday thru Friday, 7:00 am to 3:30 pm.

Sincerely,

S\
Frank S. Feldman
Investigator

FSF:lj

APPENDIX F

NEW PATIENT EVALUATION

PATIENT: RICHARDSON, ROBERT
DATE: 9-10-90

HISTORY OF PRESENT ILLNESS: Mr. Richardson is a 40-year-old male who presents for evaluation of shortness of breath, dyspnea on exertion, and wheezing, with some cough producing white phlegm. He has had this on and off for the last three years. In fact, about three years ago he had an episode so bad that he was put in the hospital after having presented to the E.R. with these symptoms. Apparently, he experienced an allergic reaction to epinephrine.

He currently takes no medications for this apparent asthmatic condition and he presents now for evaluation because it has recurred and is more bothersome to him than before.

SOCIAL AND FAMILY HISTORY: Negative. He is allergic to no medicines and is a nonsmoker.

He takes no medicines currently on a regular basis.

PAST HISTORY: Medical and surgical history is negative except for the asthmatic episode approximately three years ago, as outlined above.

The patient works as a baker and is not exposed to any unusual toxins in his profession. One significant exposure is to multiple chemical agents, including agent orange in Viet Nam in the 1970s.

GENERAL REVIEW OF SYSTEMS: Other than as outlined above, notable only for occasional low back pain which is probably secondary to musculoskeletal strain from his profession.

PHYSICAL EXAMINATION: BP 110/80. Saturation on room air was 93% with an 85 heart rate. Head normocephalic, atraumatic. Neck supple without node or mass. Chest clear. Heart regular without murmurs or gallops, lifts, thrusts, or heaves. abdomen soft; bowel sounds present without masses or organomegaly. Extremities - no edema. Gross neurologic for mental status, motor and sensory was physiologic.

IMPRESSION: 1. Cough with bronchospasm. This is probably an allergic or asthmatic phenomenon, although he does give a history to support esophageal acid reflux. He does not give a history for heart failure nor does he give a history to support sinusitis.

PLAN: Obtain complete pulmonary function tests, upper GI and barium swallow and CBC. A sample of Ventolin metered dose inhaler was given as well as a prescription. I have asked him to follow-up in about 3-4 weeks after he has had a chance to try the Ventolin and obtain the studies outlined above. I suspect we will find asthma on the pulmonary function tests and we will be able to continue the inhaler and perhaps start an oral medication if necessary. NOTE: The chest x-ray that he brings with him is negative.

S. KENT OLVEY, M.D.

SKO:pm

PULMONARY ASSOCIATES

RICHARDSON, ROBERT 10-1-90

Mr. Richardson comes in today for follow-up of his bronchospasm and cough. With the Ventolin metered dose inhaler he has done much better. Studies done at Penrose since last visit are notable for pulmonary functions with small airway obstruction which improves with bronchodilator by 17% in the $FEV_{25/75}$ category. His CBC, chest x-ray, upper GI, and barium swallow were normal.

On exam today, blood pressure 117/70. Chest clear. Heart regular without murmurs or gallops, lifts, thrusts, or heaves. Extremities - no clubbing, cyanosis, or edema.

PLAN: Continue the Ventolin metered dose inhaler. We discussed this at length. No return visit was given. He can return p.r.n.

S. KENT OLVEY, M.D./pm

Supreme Court, U.S.
FILED
MAR 25 1997
CLERK

(2)

No. 96-1160

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ROBERT RICHARDSON,

Petitioner,

v.

ALBERTSON'S, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner has presented compelling reasons, as set forth in Supreme Court Rule 10, justifying review of the Tenth Circuit's decision.

2. Whether the Tenth Circuit correctly concluded that Petitioner failed to establish a prima facie case of racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e ("Title VII"), and 42 U.S.C. §1981 ("§1981").

3. Whether the Tenth Circuit correctly concluded that the district court lacked jurisdiction over Petitioner's claim under the Americans with Disabilities Act, 42 U.S.C. §12101, *et seq.* ("ADA"), based on Petitioner's failure to adequately exhaust his administrative remedies.

LIST OF PARTIES

The petitioner is Robert Richardson. The respondent is Albertson's, Inc. Albertson's, Inc. has no parent companies or nonwholly owned subsidiaries.

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

The Petition sets forth this information in the Appendix, Sections A-C.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE BASIS FOR JURISDICTION

The Petition sets forth this information at page 1. Although Petitioner did not include a citation to the statutory provision believed to confer jurisdiction on this Court, Petitioner is attempting to invoke jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

42 U.S.C. §1981(a):

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. §2000e-2(a):

It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . . .

42 U.S.C. §2000e-5(f)(1):

. . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, . . . the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved . . . .

42 U.S.C. §12112(a):

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement or discharge of employees,

employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. §12117(a):

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

STATEMENT OF THE CASE

I. Factual Background.

Pro se Petitioner Robert Richardson ("Richardson") was discharged from his job with Respondent Albertson's, Inc. ("Albertson's") for misconduct. Mr. Richardson is an African American who was employed by Albertson's as a baker from 1981 to 1982, and from 1984 to his discharge effective July 15, 1992. (Doc. 46 at Ex. A-61:10-15, 64:19-23; Ex. B-1, ¶2).[1] Mr. Richardson's discharge arose from events occurring on June 2-5, 1992. On June 2, 1992, Mr. Richardson left the store for his lunch break. (Doc. 46 at Ex. A-126:16-127:1; Ex. B-1, ¶4). During this break, Mr. Richardson telephoned the bakery manager, Jacqueline Johnson, and told her he would be late returning to work because he had a flat tire. (Doc. 46 at Ex. D-1, ¶¶3-5). While Mr. Richardson

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[1] References to the record below are to document numbers from the district court docket sheets and to numbered pages within the document, or to exhibits submitted with the document and to numbered pages within the exhibit (see 10th Cir. R. 28.1).

was gone, two police officers came to the store with a warrant for his arrest. (Doc. 46 at Ex. B-2, ¶ 5; Ex. E-1, ¶ 3). The police officers and William Winters, another bakery employee, were at the store's entrance when Mr. Richardson drove into the parking lot. When he saw the police officers, Mr. Richardson drove off and did not return to work that day. (Doc. 46 at Ex. E-1, ¶ 3; Ex. D-1, ¶ 6; Ex. B-2, ¶ 8).

The next day, June 3, 1992, Mr. Richardson called in sick but did not state what the nature of his illness was. (Doc. 46 at Ex. A-141:25-142:7, 142:20-143:13, 147:23-24; Ex. B-2, ¶ 9).

On June 4, 1992, Mr. Richardson arrived for work around 2:00 a.m. Before punching in, he saw Mr. Winters who asked him about the events of June 2, 1992. At that time, Mr. Richardson admitted that he did not return to the store because the police officers wanted him for failure to appear. Mr. Richardson then left the store and asked Mr. Winters to lie if anyone asked him whether he had seen Richardson. (Doc. 46 at Ex. E-1-2, ¶ 4). Three other employees verified that Mr. Richardson had reported to work the morning of June 4, 1992. (Doc. 46 at Exs. F, G and H).

On June 5, 1992, Mr. Richardson called Pat Hildebrand, the store director, and said that he had been ill on June 2nd, 3rd and 4th and had gone to a doctor on June 4th.[2] (Doc. 46 at Ex. A-192:23-195:7; Ex. B-3, ¶ 14). Mr. Hildebrand requested that Mr. Richardson bring in some verification of his story, such as a doctor's note, prescription, bill or receipt. Mr. Richardson failed to

[2] Despite Mr. Richardson's assertion that he was only out sick for one day (Petition at 4), the undisputed evidence shows that he claimed to be sick for a portion of June 2nd, and all of June 3rd and 4th. (Doc. 46 at Ex. B-3, ¶ 14).

produce any documentation. (Doc. 46 at Ex. B-3, ¶ 15). When questioned, Mr. Richardson denied that he had been at the store on June 4th. (Doc. 46 at Ex. B-3, ¶ 16). Mr. Richardson was then suspended pending investigation. (Doc. 46 at Ex. B-3, ¶ 17).

Michael Schwarzkopf, Albertson's Regional Director, Labor Relations, sent Mr. Richardson a letter on June 25, 1992 setting forth the events of June 2-5 as Albertson's understood them. Mr. Schwarzkopf requested that Mr. Richardson respond with any documentation he had to disprove the facts as set forth in the letter, along with a written statement documenting the events of June 2-5. Mr. Schwarzkopf indicated that a decision would be made regarding Mr. Richardson's continued employment by July 15, 1992. (Doc. 46 at Ex. A – Richardson Dep. Ex. 14; Ex. C-1, ¶ 4; Ex. B-4, ¶ 18).

Mr. Richardson responded to this letter with a one-page, handwritten note and a copy of page 9 of the labor contract between Albertson's and the Union.[3] (Doc. 46 at Ex. A – Richardson Dep. Ex. 16; Ex. C-2, ¶¶ 5-6). The information provided was not responsive to Mr. Schwarzkopf's requests. Mr. Richardson provided no verification of his claimed illness or alleged doctor's visit, and failed to even address the facts as set forth by Albertson's. (Doc. 46 at Ex. C-2, ¶ 7). Because Albertson's had

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[3]Page 9 of the labor contract actually authorizes the actions taken by Albertson's. The contract specifically provides that "[a] doctor's certificate or other authoritative verification of illness or occupational or nonoccupational accident may be required by the Employer and, if so, must be presented by the employee not more than forty-eight (48) hours after return to work." (Doc. 46 at Ex. A – Richardson Dep. Ex. at 18 at 9). Moreover, the labor contract emphasizes that any employee "found to have abused sick leave benefits by falsification or misrepresentation shall thereupon be subject to disciplinary action . . . ." (*Id.*)

no evidence supporting Mr. Richardson's version of the events of June 2-5, he was terminated effective July 15, 1992 based on his failure to report for work as scheduled, failure to provide documentation verifying his alleged illness, and Albertson's belief that he falsified his reason for not returning to work, lied about being sick, asked a co-worker to lie for him, and falsely denied reporting to work. (Doc. 46 at Ex. C-2, ¶ 8; Ex. B-4, ¶ 22).

Mr. Richardson subsequently filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging racial and disability discrimination. (Doc. 46 at Ex. O-1). Although Mr. Richardson received two letters from the EEOC requesting information verifying his disability, he failed to provide sufficient documentation. (Doc. 46 at Exs. L and M). A determination letter was executed April 21, 1994. The letter stated that due to Mr. Richardson's failure to provide documentation showing that he was a qualified individual as required by the ADA, the EEOC lacked jurisdiction over this claim. The letter further stated that the evidence obtained during investigation of Mr. Richardson's claim did not support a violation of the statutes. Mr. Richardson was informed by the EEOC that he could "ONLY PURSUE THE TITLE VII CLAIM BY FILING SUIT AGAINST THE RESPONDENT NAMED IN THE CHARGE IN FEDERAL DISTRICT COURT WITHIN 90 DAYS OF RECEIPT OF THIS LETTER." (Doc. 46 at Ex. A, Richardson Dep. Ex. 26 (emphasis in original)).

II. Procedural History.

A. The District Court.

Mr. Richardson filed this action in the U.S. District Court for the District of Colorado, alleging that the termination of his employment constituted racial discrimina-

tion in violation of Title VII and §1981, and disability discrimination in violation of the ADA. (Doc. 1 at 3-5). Jurisdiction over Mr. Richardson's claims was based on 28 U.S.C. §1331. After a period of investigation and discovery, including the deposition of Mr. Richardson, Albertson's moved for summary judgment on all claims pursuant to Fed. R. Civ. P. 56. (Doc. 44 and 45).

The district court granted Albertson's motion, finding that Mr. Richardson had failed to provide any evidence of a disputed issue of material fact. The district court entered summary judgment on the ADA claim on three separate grounds: (1) the events giving rise to the claim occurred prior to the effective date of the Act; (2) Mr. Richardson failed to exhaust his administrative remedies; and (3) Mr. Richardson failed to file his action within ninety days of receipt of the Notice of Right to Sue. The district court granted summary judgment on the Title VII claim based on: (1) Mr. Richardson's failure to file his action within ninety days of receipt of the Notice of Right to Sue; and (2) Mr. Richardson's failure to set forth a prima facie case of racial discrimination. Likewise, summary judgment was granted on the §1981 claim on the basis of Mr. Richardson's failure to set forth a prima facie case of racial discrimination. (Petition at A5-A11).

B. The Tenth Circuit.

Mr. Richardson appealed the district court's order to the United States Court of Appeals for the Tenth Circuit. After briefing by the parties, the Tenth Circuit issued its Order and Judgment in the case, affirming the district court's judgment in favor of Albertson's. (Petition at A1-A4). The Order and Judgment agreed with the district court's conclusions that Mr. Richardson failed to establish a prima facie case of racial discrimination, and

that the court lacked jurisdiction over his ADA claim based on his failure to adequately exhaust administrative remedies. (*Id.*) Mr. Richardson filed a petition for rehearing which was denied by the Tenth Circuit on September 16, 1996.

ARGUMENT

I.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BASED ON MR. RICHARDSON'S FAILURE TO PRESENT COMPELLING REASONS JUSTIFYING REVIEW OF THE TENTH CIRCUIT'S DECISION.

As stated in Supreme Court Rule 10, a petition for a writ of certiorari will be granted only for compelling reasons and "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." While the fourteen "Questions Presented" set forth in Mr. Richardson's petition are practically unintelligible, it is clear that the petition consists entirely of assertions of erroneous factual findings (Questions Presented numbers 3, 4, 5,[4] 6, and 13) or misapplied legal standards (Questions Presented numbers 1, 2, 7, 8, 9, 10, 11, 12, and 14). (Petition at i-ii). Most of the purported facts Mr. Richardson offers to support his claims of discrimination are not properly before this Court. (Petition at 3-4). None of Mr. Richardson's facts are supported by a single citation to the record

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[4] Pursuant to Supreme Court Rule 15.2, Albertson's points out that Mr. Richardson's Question Presented number 5 ("How can the Defendant write up the Plaintiff simply for asking for a promotion?") would not properly be before the Court if certiorari were granted. This particular factual determination was not at issue below and was thus not preserved for review. *United States v. Williams*, 504 U.S. 36, 44 (1992) (party raising error must have raised the issue below and the issue must have been expressly relied upon by the court below).

below, and in fact, are not part of the record because they were never properly presented to the district court.[5] Such unsupported assertions of error do not present "compelling reasons" justifying review of the Tenth Circuit's decision.

A. The Petition Presents No Issues Of Conflict Among the Courts of Appeals or Between the Tenth Circuit and This Court.

The petition does not present issues in which there are conflicts among the courts of appeals or between the Tenth Circuit and this Court (which this Court has in the past indicated is a principal use of certiorari jurisdiction. *Braxton v. United States,* 500 U.S. 344, 347 (1991)). To the contrary, in reaching the conclusion that Mr. Richardson had not satisfied his initial burden of establishing a prima facie case of discrimination, the district court and the Tenth Circuit applied the well-established and universally accepted test (discussed below) set forth in this Court's decision in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). (Petition at A3 and A10-A11). There is absolutely no conflict between this Court and the Tenth Circuit's test for what a plaintiff in an employment discrimination case must show to survive summary judgment. The Tenth Circuit test is set forth in *Randle v. City of Aurora,* 69 F.3d 441, 451-53 (10th Cir. 1995), and is directly based upon this Court's opinions in *St.*

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[5] Federal courts routinely reject claims of error by parties who fail to provide citation to the record sufficient to determine whether an error occurred. *See, e.g., Gross v. Burggraf Constr. Co.,* 53 F.3d 1531, 1546 (10th Cir. 1995) ("Without a specific reference, we will not search the record in an effort to determine whether there exists dormant evidence which might require submission of the case to a jury. Judges are not like pigs, hunting for truffles buried in briefs.") (internal citations omitted).

Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993), and *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981).

Neither is there any conflict presented by the general legal standards used below in determining Albertson's summary judgment motion. The district court's analysis of Mr. Richardson's burden to establish a genuine issue of material fact in responding to Albertson's motion for summary judgment relied upon this Court's familiar and widely relied upon decision in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). (Petition at A8). Thus, none of the issues that form the basis of the petition can be characterized as issues in which the Tenth Circuit's Order and Judgment conflicts with a decision of this Court or of another United States court of appeals.

B. The Petition Presents No Circumstances Calling For Exercise of This Court's Supervisory Power Based on a Departure From the Accepted and Usual Course of Judicial Proceedings.

To the extent that Mr. Richardson's petition may be interpreted to request that the Court grant certiorari based upon the consideration that a "United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power" (Supreme Court Rule 10.1(a)), such argument should be rejected because this is not such a case and the "so far departed" test is only very rarely expressed as a basis for this Court to grant certiorari. To the contrary, this case presents a run-of-the-mill summary judgment decision based on well-established and correctly applied legal principles.

This Court relied on the "so far departed" test to grant certiorari in *New York City Transit Authority v. Beazer,* 440 U.S. 568 (1979). In that case, the Court found granting certiorari appropriate based on the court of appeals having affirmed on a constitutional issue without first resolving a statutory issue, which conflicted with an established judicial principle. 440 U.S. at 570-71 & n.1. In contrast, this Court denied certiorari under the "so far departed" test in *Key v. Wise,* 454 U.S. 1103 (1981). In Justice Brennan's dissent, he noted that even the prevailing party below acknowledged that the court of appeals egregiously erred in reaching its decision, the case presented fundamental jurisdictional issues of great importance, that it was an appropriate case for review under the "so far departed" test, and that the decision below should be summarily reversed. 454 U.S. at 1105 (Brennan, J., dissenting).

The present case is certainly not as significant as *Beazer,* as there are no constitutional issues involved. Nor does it present egregious errors or jurisdictional issues that in *Key v. Wise* were only significant enough to provoke a dissent from the denial of the petition for a writ of certiorari. Here, the only issues which would be properly before the Court if certiorari were granted concern whether the district court properly applied undisputed legal standards in resolving a run-of-the-mill summary judgment motion. Such issues are not what is contemplated by this Court's "so far departed" test, or review on certiorari generally. Therefore, Mr. Richardson's petition should be denied.

II.

THE TENTH CIRCUIT CORRECTLY DETERMINED THAT MR. RICHARDSON FAILED TO ESTABLISH A PRIMA FACIE CASE OF RACIAL DISCRIMINATION.

The district court and Tenth Circuit correctly dismissed Mr. Richardson's Title VII and §1981 claims based on his inability to establish a prima facie case of racial discrimination. To prevail on a claim of racial discrimination under Title VII, a plaintiff must show that his race was a motivating factor for the employment action of which he complains. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973). As set forth in *McDonnell Douglas,* the plaintiff in a Title VII action must first establish by a preponderance of the evidence a prima facie case of racial discrimination. *Id.* The burden then shifts to the defendant to show a legitimate nondiscriminatory reason for the challenged employment decision. *Id.* If the defendant meets its burden, the plaintiff may then show that the legitimate reasons offered by the employer were merely a pretext for unlawful discrimination. *Id.* at 804; *Randle v. City of Aurora,* 69 F.3d 441, 451 (10th Cir. 1995). The same analysis applies to a §1981 claim. *Patterson v. McLean Credit Union,* 491 U.S. 164, 186-87 (1989) (superseded by statute on other grounds); *Randle,* 69 F.3d at 450.

To set forth a prima facie case of racial discrimination, Mr. Richardson was required to prove that: (1) he belongs to a protected class; (2) he was qualified for the position of baker; (3) he was terminated for violating a work rule; and (4) similarly situated nonminority employees were treated differently. *Equal Employment Opportunity Comm'n v. Flasher Co., Inc.,* 986 F.2d 1312, 1316 (10th Cir. 1992); *Allen v. Denver Pub. Sch. Bd.,* 928 F.2d 978, 985 (10th Cir. 1991).

Mr. Richardson failed to present any evidence whatsoever of racial discrimination beyond his own conclusory, unsupported allegations that white coworkers were treated more favorably than he was. Mr. Richardson failed even to identify any nonminority coworkers who were treated differently. Rather, the undisputed evidence establishes that Caucasian employees were required to provide doctor's notes after being absent from work for two or more days, just as Mr. Richardson was required to do. (Doc. 46 at Ex. B-4, ¶23). In addition, two Caucasian employees were discharged from their employment at the same store for failure to report to work as scheduled. (*Id.* at ¶24). Mr. Richardson himself acknowledged that he did not know whether other employees were required to, or actually did, provide doctors' notes; rather, he merely believed that they were not required to do so. (Doc. 46 at Ex. A – 183:24-186:1; 186:19-187:1).

In his pleadings filed with the Tenth Circuit, Mr. Richardson referred to "his witness" who could prove his prima facie case. Yet Mr. Richardson never identified the witness or provided any evidence, through affidavit or otherwise, regarding the witness' anticipated testimony. A general reference to an anonymous witness in the pleadings is insufficient to raise a genuine issue of material fact. As the Tenth Circuit correctly held, mere conclusory allegations unsupported by any evidence are not enough to withstand a properly supported motion for summary judgment. (Petition at A4).

III.

THE TENTH CIRCUIT CORRECTLY DETERMINED THAT THE DISTRICT COURT LACKED JURISDICTION OVER MR. RICHARDSON'S ADA CLAIM BECAUSE HE FAILED TO ADEQUATELY EXHAUST HIS ADMINISTRATIVE REMEDIES.

The undisputed evidence presented to the lower courts established that Mr. Richardson failed to exhaust his administrative remedies with respect to his claim of disability discrimination under the ADA. Before bringing a claim in federal court under Title VII or Title I of the ADA, the charging party must exhaust his administrative remedies. 42 U.S.C. §2000e-5; 42 U.S.C. §12117(a); *Khader v. Aspin,* 1 F.3d 968, 970 (10th Cir. 1993). An employee who refuses or fails to provide sufficient information so that the agency can evaluate the merits of his claim "cannot be deemed to have exhausted administrative remedies" and the claims must be dismissed. *Khader,* 1 F.3d at 971 & n.2. As specifically stated in the EEOC's determination letter of April 21, 1994, Mr. Richardson failed to provide any documentation upon which the EEOC could determine whether he was a qualified individual under the ADA. (Doc. 46 at Ex. A, Richardson Dep. Ex. 26). Mr. Richardson never offered any evidence in dispute of this statement. Thus, Mr. Richardson failed to adequately exhaust his administrative remedies and the district court and Tenth Circuit correctly found that jurisdiction could not be exercised over his ADA claim.

CONCLUSION

For the reasons set forth above, Respondent Albertson's, Inc. respectfully requests that this Court deny Petitioner Robert Richardson's petition for a writ of certiorari.

Respectfully submitted this 25th day of March, 1997,

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(3)

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IN THE
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OCTOBER TERM, 1995

ROBERT RICHARDSON
PETITIONER

VS.

ALBERTSON'S, INC.
A DELAWARE CORPORATION
RESPONDENT

ON PETITION FOR A WRITE OF CERTIORARI TO

TENTH CIRCUIT COURT

RELY BRIEF TO THE OPPOSING BRIEF

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13 pp

QUESTION PRESENTED

1. Whether Tenth Circuit came in conflict with itself when it made this decision.

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I. United States Supreme Court has jurisdiction.

A. 28 U.S.C.S. 1257 states:

> Final judgements or decree rendered by the highest court in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the grounds of it being repugnant to the Constitution, treaties, or laws of the United States ...

This case involves the validity of a state statute on the grounds of its being repugnant to the Federal Rules of Civil Procedure, Rule 56 under the Constitution. Petitioner asserts that the Tenth Circuit Court appeals decision was in violation of the Federal Rules of Civil Process (Rule 56[s]) when the Court granted a summary judgment and it came in conflict with the U.S. Supreme Court's decision, Celotex Corp. v. Catrett.

The issue was first raised by Petitioner when the United States District Court granted a summary judgment for Respondent. Petitioner stated that granting of a summary judgment for the Respondent was in violation of Rule 56, when there was no full disclosure and the Court did not have all the pleadings, depositions, answers to interrogatories, witnesses, testimony, and admissions from either Respondent or Petitioner.

II. Tenth Circuit Court appeals made a decision on misstated facts because there was no full disclosure.

A. Petitioner left work on June 2, 1992 after working 7 hours. Petitioner telephoned the bakery manager and told her Petitioner was not returning to work because Petitioner was sick. Petitioner called in sick on June 3, 1992, and Petitioner had a scheduled day off on June 4, 1992. In the Respondent's brief, the Petitioner was suspended on June 5, 1992. The Tenth Circuit Court of Appeals stated (see Appendix A p. 4, Writ of Certiorari) Petitioner did comply with Respondent's rules by calling in sick. Respondent's rules are that an employee has to call in when they are sick. An employee needs a doctor's note after three (3) days of absentees from work. Petitioner has never broken any of Respondent's rules because Petitioner called in sick on June 3, 1992. In the case of St. Mary's Honor Center v. Hicks (1993) L Ed 2d 407, it is stated: "The Plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the Defendant were not its true reasons but were a pretext for discrimination." 450 US, at 253, 67 L Ed 2d 207, 101 S Ct 1089. The dissent takes this to mean that if Plaintiff proves the asserted reason to be false, the Plaintiff wins. However, a reason cannot be proved to be "a pretext for discrimination" unless it is shown that the reason was false and that discrimination was

the real reason. Burdine's later allusions to proving or demonstrating simply "pretext," e.g., id., at 258 67 L Ed 2d 207, 101 S Ct 1089, are reasonably understood to refer to the previously described pretext, i.e., "pretext for discrimination."

Burdine also states that when the employer has met its burden of production, "the factual inquiry proceeds to a new level of specification." Id., at 255, 672 Ed 2d 207, 101 S Ct 1089. The dissent takes this to mean that the factual inquiry reduces to whether the employer's asserted reason is true or false. If false, the Defendant loses. Evidence shows that Petitioner proved Respondent gave false reason to terminate Petitioner by stating that Petitioner lied about being sick and asked a co-worker to lie for Petitioner, who failed to report to work. Evidence also shows that Petitioner was only following the company's rules by calling in sick and that Petitioner never asked a co-worker to lie for Petitioner on June 4, 1992, when Petitioner had a scheduled day off. Therefore, Petitioner proves the discrimination case under Burdine's and St. Mary's Honor Center v. Hicks.

III. Tenth Circuit did not correctly determine that Petitioner had failed to establish a prima facie case of racial discrimination.

The District Court and Tenth Circuit did make an err in the prima facie case of racial discrimination under the Rules of Evidence §

383 discrimination -- presumption -- burden of persuasion 4a to 4c. Although the presumption -- created by the establishment of a prima facie case in an action alleging that an employer intentionally discriminated against an employee on the basis of race in violation of § 703(a)(1) of Title VII of the Civil Rights Act of 1964 (42 USCS § 2000e-2(U)(1) -- that the employer has unlawfully discriminated against the employee shifts the burden to the employer to produce a nondiscriminatory reason for its allegedly discriminatory actions, the ultimate burden of persuading the trier of fact that the employer has intentionally discriminated against the employee remains at all times with the employee, if the employer carries the burden of production, the presumption is rebutted and drops from the case, and the employee has an opportunity to demonstrate, through presentation of the employee's own case and through cross-examination of the employer's witnesses, that the proffered reason was not the true reason for the employment decision and that race was the primary reason. Since the District Court did not have a trial or a full disclosure under Rule 56[s], then this is an err in law under the Constitution.

Petitioner did present issues of conflict among the courts of appeals or between the Tenth Circuit and this Court.

A. Petitioner did present a conflict between the Tenth Circuit and this Court in the case of Celotex Corp. v. Catrett, but the Tenth Circuit did not look at any of Petitioner's arguments.

1. Did not look at any of Petitioner's evidence. See Appendices D, E, and F.
2. The Tenth Circuit did not look at any of Petitioner's argument briefs.

The Tenth Circuit had all of this information and still stated that Petitioner failed to report to work as scheduled, however, a person who has called in sick is excused from work. The Tenth Circuit did not want to use the conflict between the Court but used a misstated fact in this case. The Tenth Circuit had an opportunity to examine the evidence and argument in this case but did not do so.

B. Petition for a Writ of Certiorari should be granted based on questions presented because the Tenth Circuit's decision was based on misstated facts.

The Tenth Circuit used a misstated fact to try to get around Rule 56[s] and due process. The Tenth Circuit did set a standard on how to grant a summary judgment in the case of Haines v. Kerner but did not use these standards in the case of Richardson v. Albertson's. This is standard [8]. The District Court's discretion to choose a sanction is limited in that the chosen sanction must be both "just" and "related to the particular claim, which was at issue in the order to provide." Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 707, 102 S. Ct. 2099, 210 672 2 Ed 2d 492 (1982). Before choosing dismissal as a just sanction, a court should ordinarily consider

a number of factors, including: (1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process, (3) the capability of the litigant, Ocelot Oil Corp. v. Sparrow Indus. 847 F 2d 1458, 1465, 10th Cir (1988), quoting Meade, 841 F 2d at 1521 N 7 10th Cir. (1988), (4) whether the Court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance, see e.g., Willner v. University of Kansas, 848 F 2d 1023, 1030, 10th Cir (1988) (per curiam) Cert. denied 488 U.S. 1031, 109 S Ct 840, 102 2 Ed 2d 972 (1989); Standard Metals, 817 F 2d at 629; Moon v. Newsome, 863 F 2d 835, 837, 11th Cir, Cert. denied 493 U.S. 863 110 S Ct 180, 107 2 Ed 2d 135 (1989); Spiller v. U.S. V. Labs, Inc., 842 F 2d 535, 538, 1st Cir (1988); and (5) the efficacy of lesser sanctions. See Ocelot Oil, 847 F 2d at 1465; Meade, 841 F 2d at 1520; Taylor v. Medtronics Ins., 861 F 2d 980, 986, 6th Cir (1988). "Only when the aggravating factors outweigh the judicial system's strong predisposition to resolve cases on their merits is dismissal an appropriate sanction." Meade, 841 F 2d at 1521 N 7 (citations omitted).

[9, 10] These factors do not constitute a rigid test; rather, they represent criteria for the District Court to consider prior to imposing dismissal as a sanction. The Court should ordinarily evaluate these factors on the record.

When the Tenth Circuit Court did not use its own rules, it came in conflict with itself. The Tenth Circuit Court granted a summary judgment in favor of Respondent. It was in violation of its own standards, therefore the certiorari should be granted.

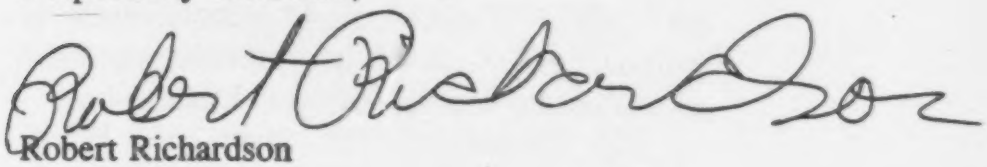
IV. Tenth Circuit Court erred when it determined the District Court lacked jurisdiction over Petitioner ADA claim because Petitioner did give adequate documentation to EEOC.

The Petitioner did give the EEOC documents about his problems with asthma. In a letter dated October 22, 1993, the EEOC addressed the documents Petitioner left at the EEOC office. The Tenth Circuit Court did not look at the evidence (see Appendix in writ of certiorari). When the Tenth Circuit Court made the decision on the ADA, it came in conflict with itself, i.e., case of Ehrenhaus v. Reynolds cited as 965 F 2d 916 (10th Cir. 1992), and it came in conflict with Pryner v. Tractor Supply Co., cited as 927 F Supp 1140 (S.D. Ind. 1996) and the violation of the Rules of Evidence, Celatex Corp. v. Catrett, 477 U.S. 317 (1986) and Rule 56[5].

CONCLUSION

This case presents serious due process issues when the court came in conflict with itself. This court has problems looking at the law and constitutional laws. This court has violated the rules and statues of the court. Petitioner respectfully requests this Court to grant writ of certiorari to review this issue.

Respectfully submitted,



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